(4)

No. 97-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

JURISDICTIONAL STATEMENT FILED JUNE 23, 1997
PROBABLE JURISDICTION NOTED SEPTEMBER 29, 1997

(COUNSEL LISTED ON INSIDE COVER)
NOVEMBER 1997

51 pp

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff,	•	
	•	Civil Action
v.	•	No. 96-1274 (GK)
UNITED STATES OF AMERICA, Defendant.	•	

6/7/76	1	COMPLAINT filed by plaintiff STATE OF TEXAS (dam) [Entry date 06/17/96]
6/7/96	2	APPLICATION by plaintiff STATE OF TEXAS for a Three Judge Court (dam) [Entry date 06/17/96]
6/17/96	3	ORDER by Judge Gladys Kessler: to show cause by 4:00 p.m. on 6/28/96 as to whether this casue is cognizable in this Court and whether the undersigned Judge should request the convening of a Three-Judge District Court (N) (pob)
6/28/96	4	MOTION filed by federal defendant USA to extend time to 7/10/96 to respond to Order to show; attachments (1) (dam) [Entry date 07/01/96]
7/1/96	5	ORDER by Judge Gladys Kessler: granting motion to extend time to 7/10/96 to respond to Order to show [4-1] by USA (N) (pob)

7/10/96 6 RESPONSE by federal defendant USA to order to show cause by 4:00 p.m. on 6/28/96 as to whether this cause is cognizable in this Court and whether the undersigned Judge should request the convening of a Three-Judge District Court [3-1], order [3-2]; attachments (1) (dam) [Entry date 07/11/96]

7/15/96 7 ORDER by Judge Gladys Kessler: granting motion for a Three Judge Court [2-1] by STATE OF TEXAS; directing the Clerk to forward a copy of this Order to the Chief Judge of the U.S. Court of Appeals for the District of Columbia. (N) (pob) [Entry date 07/16/96]

7/22/96 8 REPLY by plaintiff STATE OF TEXAS to response to order to show cause by 4:00 p.m. on 6/28/96 as to whether this cause is cognizable in this Court and whether the undersigned Judge should request the convening of a Three-Judge District Court [3-1]. (dam) [Entry date 07/23/96]

7/24/96 9 CERTIFIED COPY of Order by Chief Judge Harry T. Edwards, filed in USCA on 7/22/96, directing pursuant to 28 USC 2284(b)(1), that Circuit Judge Judith W. Rogers and District Judge Aubrey E. Robinson are hereby designated to serve with District Judge Gladys Kessler to hear and determine this cause. (gt) [Entry date 07/25/96]

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8/9/96 11 ANSWER TO COMPLAINT [1-1] by federal defendant USA. (dam) [Entry date 8/12/96]

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09/23/96 13 MOTION filed by federal defendant USA to dismiss complaint [1-1], or, in the alternative for judgment on the pleadings; attachments (1) (dam) [Entry date 09/24/96]

10/3/96 14 MOTION filed by federal defendant USA to strike motion for summary judgment [12-1]; attachment (1). (tth) [Entry date 10/04/96]

10/11/96 15 RESPONSE by plaintiff STATE OF TEXAS in opposition to motion to strike motion for summary judgment [12-1] [14-1] by USA. (dam) [Entry date 10/15/96]

10/21/96 16 RESPONSE by federal defendant USA in opposition to motion for summary judgment [12-1] by STATE OF TEXAS. (jmf) [Entry date 10/22/96]

10/21/96 17 RESPONSE by plaintiff STATE OF TEXAS to

		motion to dismiss complaint [1-1] [13-1] by USA (dam) [Entry date 10/22/96]
11/5/96	18	REPLY by federal defendant USA to response to motion to dismiss complaint [1-1] [13-1] by USA; attachments (2). (tth) [Entry date 11/06/96]
3/5/97	19	MEMORANDUM OPINION by Circuit Judge Rogers, Judge Kessler, Judge A. Robinson signed by Judge Gladys Kessler (N) (pob) [Entry date 03/06/97]
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4/23/97	23	NOTICE OF APPEAL by plaintiff STATE OF TEXAS to the U.S. Supreme Court from order [20-1], entered on: 3/6/97; NO FEE PAID. (tth) [Entry date 04/24/97]
4/30/97	--	US Supreme Court appeal filling fee of $5.00 paid [23-1] by STATE OF TEXAS, by plaintiff STATE OF TEXAS. USCA notified. (tth) [Entry date 05/01/97]
5/12/97	24	SUPPLEMENT by plaintiff STATE OF TEXAS to notice of appeal [23-1] by STATE OF TEXAS (tth) [Entry date 05/13/97]
7/7/97	--	US Supreme Court #97-29 assigned for appeal [23-1] by STATE OF TEXAS (tth) [Entry date 07/09/97]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed June 7, 1996

STATE OF TEXAS, Plaintiff,	*	CASE NUMBER 1:96CV01274
	*	JUDGE: Gladys Kessler
v.	*	
	*	DECK TYPE: Three Judge Court
UNITED STATES OF AMERICA, Defendant.	*	DATE STAMP: 06/07/96

ORIGINAL COMPLAINT

The State of Texas ("Texas") files this action pursuant to the Voting Rights Act, 42 U.S.C. § 1973c, seeking a declaratory judgment with respect to Chapter 39.131 of the Texas Education Code. Specifically, Texas seeks a declaratory judgment that the temporary placement of a master or management team under § 39.131(a)(7) and (8) need not be precleared because it is not a change affecting voting, and, therefore, that the Voting Rights Act does not apply to these provisions. In support of this action, Texas shows the Court as follows:

JURISDICTION AND PARTIES

1. This action arises under section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, which, when applicable, prevents implementation of state electoral law changes until the preclearance precondition is satisfied administratively or judicially.

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1973c. Venue is proper under 42 U.S.C. § 1973c.

3. Plaintiff, The State of Texas, is a jurisdiction covered by section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. See 28 C.F.R. Part 51, App. (1993).

4. Defendant, The United States of America, is the national sovereign and has substantial responsibilities under section 5 of the Voting Rights Act. Texas has served the United States pursuant to Fed. R. Civ. P. 4(i), by sending a copy of the summons and complaint by certified mail addressed to the civil process clerk at the office of the United States attorney for the District of Columbia and to the Attorney General of the United States at Washington, District of Columbia.

THREE JUDGE PANEL REQUESTED

5. Texas requests that a three-judge Court be convened pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c.

FACTUAL ALLEGATIONS

6. Texas, like all States, has a substantial interest in the education of its children. Recognizing that "[a] general diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people," Texas has made it "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. Art. VII, § 1. Article VII, § 3 of the Texas Constitution provides in part that "the Legislature may also provide for the formation of school district[s] by general laws." The Texas Supreme Court has held that this constitutional provision gives "the Legislature a free hand establishing independent school districts including the abolition and consolidation of districts." *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District*, 826 S.W.2d 489, 511 (Tex. 1992) (internal quotations omitted), *modified*, 893 S.W.2d 468 (Tex. 1995).

Moreover, the Texas Legislature has enacted an accountability system which holds local school districts responsible for academic performance levels and for compliance with state laws and effective governance procedures. This accountability system provides the State with important controls that ensure that school districts, superintendents, and campuses provide the best education possible to Texas children.

7. Chapter 39 of the Texas Education Code, enacted in 1995, contains Texas' assessment and accountability system, which holds school districts accountable for student performance. The Commissioner of Education is authorized to impose sanctions upon a district based upon a lowered or unimproved accreditation rating where an annual review of academic performance reveals unacceptable performance by a subgroup for which data is disaggregated as to race, ethnicity, sex, or socioeconomic status under § 39.051(b) (§ 39.073). In other words, students are tested by a state administered exam and school districts are rated according to the performance of students in that district on the exam. The exam results are disaggregated by the ethnicity of students in the district and the district is held accountable for the performance of each group. For example, a school district in which a high proportion of African-American students failed the math portion of the exam is designated as low-performing based solely on the performance of this group of students. This system ensures that the school district and the state focus on means of increasing the performance of all student groups. This procedure has resulted in increased performance by all student groups statewide.

8. In addition, the Commissioner is also authorized to impose sanctions upon a district where (1) an investigation discloses violations of federal law or regulations regarding federally-required or funded programs (§ 39.074); or (2) an investigation discloses a violation of the state's accountability system, required accounting and financial practices, excessive alternative placements, violation of civil rights or other federally-imposed requirements, or of the legally-established

roles of superintendent and board of trustees (§ 39.075).

9. Section 39.131 of the Texas Education Code authorizes the Commissioner of Education to impose sanctions on a school district "to the extent the Commissioner determines necessary." TEX. EDUC. CODE § 39.131(a). This flexibility allows the Commissioner to deal quickly and effectively with problems that jeopardize the education of Texas children in a particular district.

10. The options available to the Commissioner in order to insure compliance by the school districts with state educational objectives increase in severity. They include: (1) issuance of a public notice of the deficiency to the board of trustees; (2) ordering a hearing conducted by the board of trustees of the district to notify the public of the unacceptable performance, the improvements in performance expected by the agency, and the sanctions that may be imposed if the performance does not improve; (3) ordering the preparation of a student achievement improvement plan that addresses each academic excellence indicator for which the district's performance is unacceptable, submission of the plan to the Commissioner for approval, and implementation of the plan; (4) ordering a hearing to be held before the Commissioner or his designee at which the president of the board of trustees and the superintendent of the district shall appear and explain the district' s low performance, lack of improvement, and plans for improvement; (5) arranging an on-site investigation of the district; and, (6) appointing an agency monitor to participate in and report to the agency on the activities of the board of trustees or superintendent. TEX. EDUC. CODE §§ 39.131 (a)(1)-(6).

11. Other sanctions available to the Commissioner include: (7) appointing a master to oversee the district's operations; (8) appointing a management team to direct the operations of the district in areas of unacceptable performance or requiring the district to obtain certain services under contract with another person; (9) appointing a board of managers

composed of residents of the district to exercise the powers and duties of the board of trustees if a district has been rated academically unacceptable for a period of one year or more; and (10) annexing the district to one or more adjoining districts, or requesting the Board of Education to revoke a district's home-rule school district charter, if a district has been rated as academically unacceptable for a period of two years or more. TEX. EDUC. CODE § 39.131(a)(7)-(10). Sanctions (9) and (10) are not in issue in this action.

12. Agency policy requires first the imposition of sanctions which do not include the appointment of a master or management team. Most interventions begin and end with a required improvement plan, a hearing, or the presence of a monitor. The Commissioner is required under § 39.131(c) to review annually the performance of districts subject to sanctions based upon academic performance, and to increase the level of sanction in the absence of improvement unless the Commissioner finds good cause for not doing so. The appointment of a master or management team pursuant to § 39.131(a)(7) and (8) provides the Commissioner with necessary options to deal with serious problems which threaten the educational process in a district.

13. When the Commissioner appoints a master or management team to oversee the operations of a school district, the Commissioner must clearly define their powers and duties. TEX. EDUC. CODE § 39.131(e). State law defines the limited powers of the master or management team. A master or management team may: (1) direct an action to be taken by the principal of a campus, the district superintendent, or the district's board of trustees; and (2) approve or disapprove any action of the campus principal, the district superintendent, or the district's board of trustees. TEX. EDUC. CODE § 39.131(e)(1), (2). State law prohibits a master or management team from taking any action concerning a district election, including ordering or canceling an election or altering the date of, or the polling places for, an election; changing the number

of or method of selecting the board of trustees; setting a tax rate for the district; and adopting a budget for the district that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the board of trustees. TEX. EDUC. CODE § 39.131(e)(3)-(6).

14. In addition, a master or management team serves for a limited period of time. Under § 39.131(e), the Commissioner must evaluate the continued need for the master or management team every 90 days. Unless that evaluation indicates that continued appointment is necessary for effective governance of the district or delivery of instructional services, the master or management team must be removed. *Id.* Moreover, the elected board of trustees is not displaced during the time the master or management team is in place. A portion of their responsibilities is allocated to the master or management team for a limited period of time until the deficiency is corrected. Finally, a party that disagrees with the Commissioner's actions, including a change in a district's accreditation status or the imposition of sanctions on a district, has a right to appeal the evaluation to the district court of Travis County. TEX. EDUC. CODE § 7.057(d).

15. Moreover, the provisions permitting the appointment of a master or management team are consistent with federal law, which requires Texas to maintain an educational system that includes a system of assessment and accountability. The "Improving America's Schools Act," 20 U.S.C. §§ 6301 *et seq.*, requires state oversight of educational agencies which receive federal funding to ensure that adequate progress is made towards meeting the state's student performance standards. The Act also requires the state to take corrective action against schools that fail to make adequate progress after four years of low performance.

16. The federal legislation provides for interventions similar to those in Chapter 39 of the Texas Education Code. These include removing particular schools from the jurisdiction of the local educational agency and establishing alterative arrangements for public governance and supervision of such

schools; appointment by the state educational agency of a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and school board; and the abolition or restructuring of the local educational agency. 20 U.S.C. § 6317(d)(6)(B)(i)(III), (V), (VI).

17. Moreover, Texas has been selected as an "Ed-Flex Partnership State" under the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"), one of only six states to be selected. Under Ed-Flex, the state is granted authority normally reserved to the Secretary of Education. This delegation of authority includes the ability to waive the accountability provisions of Title I of the Elementary and Secondary Education Act, (20 U.S.C. §§ 6301 *et seq.*), as amended by the Improving America's Schools Act of 1994, and to conform them with state law counterparts. 20 U.S.C. § 5891(b)(1). Title I includes the accountability provisions of 20 U.S.C. § 6317(d).

18. The Texas Ed-Flex application included provisions under which the Texas Commissioner of Education would appoint a committee to review waiver requests from school districts and make recommendations for statewide waivers. The first statewide waiver approved by the committee allows the state to utilize federal accountability provisions in a manner consistent with Chapter 39 of the Texas Education Code. In other words, the sanctions enumerated in Chapter 39.131 of the Texas Education Code are authorized by the federal statute. Because action taken under authority of federal law does not require preclearance by the federal government, the adoption of the Ed-Flex waiver would also allow Texas to take action under Chapter 39.131 without preclearance.

PRIOR PRECLEARANCE HISTORY

19. After passage of Senate Bill 1, of which Chapter 39 of the Texas Education Code was a part, Texas submitted portions of S.B. 1 to the United States Department of Justice

("DOJ") for administrative preclearance under section 5 of the Voting Rights Act. Texas submitted the sanctions provisions of § 39.131 under protest because it did not believe them to be election-related changes. However, DOJ disagreed. Although the DOJ correctly determined that the sanctions under § 39.131(a)(1)-(6) are not voting changes subject to preclearance under § 5 of the Voting Rights Act, it concluded that Texas must obtain preclearance in each instance that it appoints a master or a management team to a school district under § 39.131(a)(7) and (8).

REQUEST FOR DECLARATORY JUDGMENT

20. Texas seeks a ruling from this Court that the provisions of Chapter 39 of the Texas Education Code pertaining to appointment of a master and/or a management team are not subject to the preclearance requirement of Section 5 of the Voting Rights Act. Sections 39.13 l(a)(7) and (8) do not constitute a voting qualification or prerequisite to voting, or a standard, practice or procedure with respect to voting. Rather, these provisions, like §§ 39.131(a)(1)-(6) are a change in the distribution of power among officials which has no direct relation to, or impact, on voting.

21. The power held by the oversight authorities, i.e., the master or management team, is limited in scope and time until the school district or campus begins to operate at an acceptable level of performance. There is no replacement of the elected board of trustees.

22. In addition, because Texas is an Ed-Flex Partnership State, it is authorized to conform federal authority to impose sanctions under 20 U.S.C. §6317(d) with the provisions of Texas Education Code § 39.131. Consequently, action taken under authority of 20 U.S.C. § 6317(d), as modified pursuant to Ed-Flex, 20 U.S.C. § 5891(e), does not require preclearance under the Voting Rights Act.

REQUEST FOR RELIEF

WHEREFORE, the State of Texas asks this Court to:

a. Assert jurisdiction in this matter and request the convening of a three-judge Court;

b. Issue a declaratory judgment that the preclearance provisions of Section 5 of the Voting Rights Act do not apply to §§ 39.131(a)(7) and (8) of the Texas Education Code because they are not a change affecting voting;

c. Alternatively, issue a declaratory judgment that the preclearance provisions of section 5 of the Voting Rights Act do not apply to actions taken pursuant to 20 U.S.C. § 5891(e) to conform with TEX. EDUC. CODE § 39.131; and

d. Grant such other and further relief as is deemed just and proper.

Respectfully submitted,

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/s/
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ATTORNEYS FOR STATE OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed August 9, 1996

STATE OF TEXAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 96-1274 (JWR AER GK)
UNITED STATES	)	
OF AMERICA,	)	
	)	
Defendant.	)	

ANSWER

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. The United States does not oppose this matter being heard by a three-judge court.
6. The United States admits that Texas has a substantial interest in the education of its children. The United States admits that the referenced materials are accurately quoted in relevant part. The United States lacks sufficient knowledge or information to admit or deny the remainder of the allegations contained in Paragraph 6.
7. The United States admits that Chapter 39 of the Texas Education Code authorizes the Texas Commissioner of Education to impose sanctions upon a school district on the basis of certain testing and accreditation criteria. The United States lacks sufficient knowledge or information to admit or deny the remainder of the allegations contained in Paragraph 7.
8. Admit.

9. The United States admits that Chapter 39 of the Texas Education Code authorizes the Texas Commissioner of Education to impose sanctions upon a school district "to the extent the commissioner determines necessary." The United States lacks sufficient knowledge or information to admit or deny the remainder of the allegations contained in Paragraph 9.

10. The United States lacks sufficient knowledge or information to admit or deny whether the sanctions cited in Paragraph 10 are increasing in severity. The remainder of the allegations contained in Paragraph 10 are admitted.

11. Admit.

12. The United States admits that Chapter 39 of the Texas Education Code requires annual review of school districts' academic performance and authorizes the Texas Commissioner of Education to impose sanctions based upon academic performance. The United States lacks sufficient knowledge or information to admit or deny the remainder of the allegations contained in Paragraph 12.

13. The United States admits the first, third and fourth sentences. The second sentence is denied to the extent that it alleges the Commissioner of Education to have no discretion in defining the powers of masters and management teams.

14. The United States admits the second and third sentences to the extent that they allege that Chapter 39 provides for periodic renewal of master and management team appointments. The United States denies that a master or management team appointed under Chapter 39 necessarily will serve for a limited period of time. The remainder of the allegations in Paragraph 14 are denied to the extent that they allege that no replacement of elected school board members by masters or management teams might occur pursuant to Chapter 39.

15. The United States lacks sufficient knowledge or information to admit or deny the allegation that "the provisions permitting the appointment of a master or management team are

consistent with federal law". The remainder of the allegations contained in Paragraph 15 are admitted.

16. The United States admits the allegations in the first sentence to the extent that 20 U.S.C. §§ 6301 et seq. provides for optional, discretionary actions by state officials that are similar to some of those established by Chapter 39. The United States denies the allegations in the first sentence to the extent that they allege the federal legislation to require any particular action by state officials. The second and third sentences contained in Paragraph 16 are admitted.

17. The United States lacks sufficient knowledge or information to admit or deny the allegations contained in the first, second and third sentences as they pertain to Texas. The fourth sentence contained in Paragraph 17 is admitted.

18. The United States lacks sufficient knowledge or information to admit or deny the allegations contained in the first, second and third sentences. The remainder of the allegations contained in Paragraph 18 are denied.

19. The United States admits the first and third sentences. The remainder of the allegations in Paragraph 19 are denied.

20. The United States admits that Texas seeks a ruling from this Court that appointments of masters and management teams pursuant to Chapter 39 are not subject to Section 5 preclearance. The remainder of the allegations contained in Paragraph 20 are denied to the extent that they allege that no replacement of elected school board members by masters or management teams might occur pursuant to Chapter 39.

21. The allegations in Paragraph 21 are denied to the extent that they allege that no replacement of elected school board members by masters or management teams might occur pursuant to Chapter 39, or that a master or management team appointed under Chapter 39 necessarily will serve for a limited period of time.

22. Denied.

Prayer for Relief

Subsections b), c) and d) of the prayer for relief are denied insofar as they allege that Texas is entitled to relief on the basis of the claims stated in the complaint.

First Affirmative Defense

The Court lacks jurisdiction because the plaintiff's claims are not ripe for judicial review.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 1996, I served or caused to served by telefacsimile and by overnight delivery a copy of the United States' Answer upon the following persons:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Filed May 11, 1995

JIMMIE CASIAS, SANTIAGO PACHECO, and MARY OCHOA,	)	
Plaintiffs,	)	
VS.	)	CIVIL ACTION
	)	NO. SA-95-CA-0221
MICHAEL MOSES, Texas Commissioner of Education; TEXAS EDUCATION AGENCY; TEXAS STATE BOARD OF EDUCATION; and STATE OF TEXAS;	)	
Defendants.	)	

Before FORTUNATO P. BENAVIDES, Circuit Judges, and ORLANDO L. GARCIA and EDWARD C. PRADO, District Judges.[1]

ORDER ON PRELIMINARY INJUNCTION

On this date came on to be considered the Plaintiffs'

[1] Plaintiffs properly requested a three-judge panel pursuant to 42 U.S.C. § 1973c. *Allen v. State Board of Elections*, 393 U.S. 544, 563, 89 S.Ct. 817, 830, 22 L.Ed.2d 1 (1969). The panel was designated by Henry A. Politz, Chief Judge, United States Court of Appeals for the Fifth Circuit.

Motion for Preliminary Injunction, filed March 13, 1995.[2] After careful review of the various pleadings and responses[3] filed with the Court, and hearing the evidence and arguments presented by the parties, the Court finds that the motion should be granted.

This case arises under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Section 5 governs changes in election or voting procedures that may have the purpose or effect of discriminating against minority voters, and requires covered jurisdictions, such as Texas, to obtain preclearance of new statutes which impact on voting practices or procedures. *Id.* Preclearance may be obtained through two different methods:

> Through judicial preclearance, a covered jurisdiction may obtain from the United States District Court for the District of Columbia a declaratory judgment that the voting change 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.' (citation omitted) Through administrative preclearance, the jurisdiction may submit the change to the Attorney General of the United States. If the Attorney General 'has not

[2] Plaintiffs' Motion for Temporary Restraining Order filed contemporaneously with the Motion for Preliminary Injunction was denied on March 15, 1995.

[3] The Court has also taken notice of and considered the pleadings and arguments presented in the companion case styled *United States of America v. Michael Moses, Texas Commissioner of Education; et al*, Cause No. SA-95-CA-0275, also filed in the United States District Court, Western District of Texas, San Antonio Division.

> interposed an objection within sixty days after such submission, ' the State may enforce the change.

Clark v. Roemer, 500 U.S. 646, 648-49, 111 S.Ct. 2096, 2099, 114 L.Ed.2d 691 (1991).

Plaintiffs are eligible Hispanic voters residing in the Somerset Independent School District, Bexar County, Texas ("Somerset I.S.D."). They seek to enjoin the Defendants, the State of Texas and various Texas state education officials and agencies, from appointing a management team to oversee and direct the operation of the Board of Trustees of the Somerset I.S.D. ("the Board"). Plaintiffs allege that the statute which allows the appointment of such a management team, Chapter 35 of the Texas Education Code, "Public School System Accountability," is a change affecting voting that is subject to the preclearance requirements of § 5 of the Voting Rights Act. Plaintiffs maintain that Chapter 35 was never precleared and thus is legally invalid and unenforceable. Defendants assert that neither the enactment of Chapter 35 nor the appointment of a management team pursuant to that provision falls within the purview of § 5 because neither action is "a change affecting voting."

Background

In 1993, the Texas legislature adopted the relevant Chapter 35 of the Texas Education Code, "Public School System Accountability,"as part of Senate Bill 7, 73rd Leg., Reg. Sess.[4] Chapter 35 sets performance standards for school

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[4] The Court takes notice that there are now *three* Chapter 35s, all enacted in 1993. The Chapter 35 at issue, Tex. Educ. Code §§ 35.001-35.121, is located between the other two Chapter 35s ("Advanced Placement Incentives" and "Texas Partnership and Scholarship Program"), beginning on page 134 of Vernon's Texas Codes Annotated, volume 2 Education Code (1995 Supp.)

districts and provides for remedial measures that can be implemented by the state where a district is not meeting minimum standards and may be in jeopardy of losing accreditation. Among other things, the Commissioner of Education may "appoint a management team to direct the operations of the district in areas of unacceptable performance." Tex. Educ. Code § 35-121(a)(8). A management team appointed to oversee operations of a district may:

> (1) direct an action to be taken by the principal of a campus, the superintendent of the district, or the board of trustees of the district; or
>
> (2) approve or disapprove any action of the principal of a campus, the superintendent of the district, or the board of trustees of the district.

Tex. Educ. Code § 35.121(e).

In 1994, the Texas Education Agency ("TEA") began receiving reports of escalating tension and animosity between the community of Somerset, the school administration, and members of the Board of Trustees.[5] There were serious conflicts in the community and on the Board over at-large

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[5] This was not the first time that TEA had concern about the administration of Somerset I.S.D. In 1991, a monitor was appointed to oversee the district's deficient instructional program, however, the monitor had been withdrawn prior to the events that culminated in this lawsuit.

versus single member district election of Board members, and over the performance and political involvement of the school superintendent. After investigation by the staff of the Governance Operations Division in the Office of Accountability of the TEA, the Commissioner of Education concluded that a volatile and potentially violent situation existed that threatened the day-to-day operations of the district and was likely to "spill over into the schools impacting the learning environment and endangering student and staff safety." By letter dated February 21, 1995, the Commissioner announced the appointment of a management team "to oversee the operations of Somerset ISD and to guide the district in restoring stability to its governance operations." The February 21 letter also outlined the team's authority:

> The Management Team will have the authority to approve or disapprove any action of the board of trustees and of the administration . . .
>
> Duties of the Management Team will include but not be limited to:
>
> * having authority to approve or disapprove the convening of all board meetings
>
> * guiding the district in its policy and administrative decision-making process ...
>
> * ensuring the conduct of all board meetings is in accordance with state law and policy, appropriate parliamentary procedures, and good conduct . . .

Since its appointment, the management team has exercised its power to approve and/or convene meetings of the Board, and has vetoed or threatened to veto certain Board actions. Neither

TEA nor the Commissioner has given any indication of how long the management team may be in place.

Analysis

The issue before the Court at this time is whether a preliminary injunction should issue to preclude Defendants from taking any action under Chapter 35 until the Court has determined if that legislation requires preclearance pursuant to § 5 of the Voting Rights Act. Four prerequisites must be met before a party is entitled to preliminary injunctive relief:

(1) a substantial likelihood that plaintiff will prevail on the merits,

(2) a substantial threat that irreparable injury will result if the injunction is not granted,

(3) a determination that the threatened injury outweighs the threatened harm to the defendant, and;

(4) that granting the preliminary injunction will not disserve the public interest.

Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 471 (5th Cir. 1985). Among the four prerequisites, the finding of irreparable harm is central and preeminent. *Canal Authority of the State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). However, because of the nature of dispute in this case, a finding that Plaintiffs are likely to prevail on the merits weighs heavily toward finding that irreparable harm will result if an injunction is not granted.

The United States Supreme Court has held that if voting changes subject to § 5 are not precleared, plaintiffs objecting to those changes are entitled to an injunction prohibiting the state

from implementing the changes. *Clark*, 500 U.S. at 652-53, 111 S.Ct. at 2101; *Allen v. State Board of Elections*, 393 U.S. 544, 572, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969). Section 5 is a congressional response to "the unremitting efforts by some state and local officials to frustrate their citizens' equal enjoyment of the right to vote." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501, 112 S.Ct. 820, 827, 117 L.Ed. 2d 51 (1992). "Congress intended [§ 5] to reach any state enactment which altered the election law of a covered State in even a minor way." *Presley*, 502 U.S. at 501, 112 S.Ct. at 827-28. Section 5 itself provides that an action to enjoin enforcement of changes affecting voting may be brought even if the Attorney General has failed to make an objection or has indicated that no objection will be made to the change, or when a declaratory judgment has been entered. Thus it is clear that § 5 was intended to prevent the inevitable harm that accrues not only when citizens are deprived of their voting rights but the harm that may occur when the historically slow pace of justice allows such a deprivation to continue unabated pending, a final determination. The Court finds that if the Plaintiffs are likely to succeed on the merits then a substantial threat of irreparable harm to the Plaintiffs' voting rights has been established.

Defendants' primary argument is that Chapter 35 is not a change affecting voting subject to preclearance under § 5.[6]

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[6] There does not appear to be any real disagreement that Chapter 35 has not been precleared. Although Senate Bill 7, in which Chapter 35 is included, was submitted to the Attorney General for review, Chapter 35 was not one of the portions of the bill identified as being a potential change affecting voting. Defendants conceded during the evidentiary hearing on the preliminary injunction that the submission of the entire bill without calling specific attention to Chapter 35 was probably insufficient to meet the preclearance requirements of § 5. *See Clark*, 501 U.S. at 656-58 and n. 26 & 28, 111 S.Ct.

This contention is based chiefly on the case of *Presley v. Etowah County Comm'n*, 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992). Plaintiffs urge that the case at bar involves the *de facto* replacement of an elected board with an appointed team, an issue the *Presley* Court expressly did not reach. *Presley*, 502 U.S. at 508, 112 S.Ct. at 831. Based on the pleadings and evidence to date, the Court is inclined to agree with Plaintiffs that *Presley* may not be controlling in this case.

Presley dealt with two fact situations, both of which involved the redistribution of certain powers among elected and appointed officials. In contrast, Chapter 35 of the Texas Education Code gives the State broad authority to appoint a management team that can completely usurp the function of the Somerset I.S.D. Board of Trustees. In fact, the Commissioner's letter appointing the management team in this instance specifically notes that the team may veto any, and we presume all, of the actions of the Board. The Supreme Court has stated that the replacement of an elected office with an appointed one is a change subject to preclearance under § 5. *Allen*, 393 U.S. at 569-70, 89 S.Ct. at 833-34. The Supreme Court also recognized that there might be circumstances in which "an otherwise uncovered enactment . . . might . . . rise to the level of a *de facto* replacement of an elective office with an appointive one, within the rule of *Bunton v. Patterson*."[7]

103-04; *McCain v. Lybrand*, 465 U.S. 236, 256-57, 104 S.Ct. 1037, 1049, 79 L.Ed.2d 271 (1984). Defendants will have the opportunity to brief this issue in more detail if they wish prior to the Court's final ruling on declaratory judgment.

[7] *Bunton v. Patterson* is the case decided in *Allen*, 393 U.S. at 550-51, 567-70, 89 S.Ct. at 823-24, 833-34, which involved the replacement of an elected office with an appointed one.

Presley, 502 U.S. at 508, 112 S.Ct. at 831. Because of the broad authority given to the management team,[8] it appears that the changes contemplated by Chapter 35, as a practical matter, could result in the replacement of the elected Board with the appointed management team.[9] It is Plaintiffs' position that this type of action is a change requiring preclearance under § 5 and it appears likely at this time that Plaintiffs will prevail on the merits of the declaratory judgment.

Finally, the Court must consider whether the threatened injury outweighs the threatened harm to the defendant and whether an injunction would disserve the public interest. If the State of Texas is prohibited from acting pursuant to Chapter 35, the hostilities at the Board meetings may well continue and could conceivably affect the educational welfare of the students in the Somerset I.S.D. But it would seem that such hostilities might be better addressed through local and state law enforcement agencies instead of a takeover of the rights of the

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[8] Pursuant to the Chapter 35 provision in question, it appears that the management team has absolute control over the business before the elected school board. The management team can approve or disapprove the agenda for any meeting of the school board and has the right to determine the outcome of any matter that the team allows the school board members to consider.

[9] The fact that the team may not exercise all of the power entrusted to it is not relevant in the determination of whether Chapter 35 is a change affecting voting. It is the scope of the enactment on its face that must be considered. *See State of Texas v. U.S.*, 866 F.Supp. 20, 26 (D.C.Cir. 1994)(considering whether the legislative scheme replaces the existing body).

elected school board members. In any event, the citizens of Somerset risk being deprived of their constitutional right to vote if the management team stays. If Chapter 35 is subject to preclearance, Plaintiffs would be entitled to an injunction as a matter of law without any further showing of irreparable harm or balancing of interests. *Clark*, 500 U.S. at 652-52, 111 S.Ct. at 2101; *Government of the Virgin Islands, Dept. of Conservation v. Virgin Islands Paving, Inc.*, 714 F. 2d 283, 286 (3rd Cir. 1983). In this case, the Congressional intent is clear that voting rights take precedence over other state interests. Prevention of even a threat of discrimination in voting is the entire purpose behind § 5. Therefore, the Court finds that a preliminary injunction will serve the public interest in voting which, in this case, outweighs the State's concern that community conflict may have a negative impact on the smooth functioning of the school district.

Because the parties came before the Court initially on the matter of the preliminary injunction, all parties may not have had the opportunity to fully brief the issues regarding Plaintiffs, requested declaratory judgment on preclearance. For that reason and because the court intends to consolidate this case with the companion case brought by the Department of Justice,[10] the Court will grant the motion for preliminary injunction at this time and reserve a final determination on the merits until the parties have had an opportunity to fully present their views.

Accordingly, it is hereby ORDERED that the Motion for Preliminary Injunction is GRANTED. Defendants Michael Moses as the Commissioner of Education, the Texas Education Agency, the Texas State Board of Education and the State of

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[10] All parties agreed at the evidentiary hearing that this case should be consolidated with Cause No. SA-95-CA-O275, styled *United States of America v. Michael Moses, Texas Commissioner of Education, et al.*

Texas, along with their agents, officers, representatives, successors, employees, and those acting in concert with them, shall refrain from implementing any action with respect to Somerset I.S.D. or the Somerset Board of Trustees pursuant to Tex. Educ. Code §§ 35.065 and 35.121, or the Commissioner's letter of February 21, 1995, pending a ruling from this Court regarding the necessity for preclearance for those enactments under § 5 of the Voting Rights Act.

SIGNED and ENTERED this *11th* day of *May* 1995.

FORTUNATO P. BENAVIDES
JUDGE, UNITED STATES
COURT OF APPEALS FOR
THE FIFTH CIRCUIT

/s/
ORLANDO L. GARCIA
UNITED STATES
DISTRICT JUDGE

/s/
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

August 14, 1995

The Honorable Antonio O. Garza, Jr.
Secretary of State
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Chapter 7, Subchapter D; Chapter 11, Subchapter C; Chapter 12; Chapter 13; Chapter 39; and Chapter 45 of Senate Bill 1 (1995), which concern the Texas Education Code, submitted to the Attorney General pursuant to section 5 o f the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on June 13, 1995.

The State has an obligation under the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, to describe "with sufficient particularity" all voting changes contained in a submission, 28 C.F.R. 51.26 (c) and 51.27 (c). In this instance, the State has not identified with sufficient particularity all of the voting changes contained in Senate Bill 1 (1995). Below is a description of the voting changes that were apparent from a review of the information provided by the State. We are compelled to point out that the description that follows may not represent all of the voting changes contained in the legislation, and that if other voting changes are contained therein, they will be subject to section 5 review.

Chapter 7, Subchapter D authorizes the State Board of Education to create special school districts; requires the State Board of Education to adopt probation and revocation procedures for home-rule school districts; lowers the age

qualification for Board of Education candidates; and changes the method of filling vacancies on the Board of Education.

Chapter 11, Subchapter C enables the board of trustees of existing independent school districts to increase the number of trustees to seven; enables independent school districts to adopt cumulative voting and provides the procedures and requirements relating thereto; prevents a candidate for a numbered position from declaring the specific position for which, and the candidate against whom, he/she is running; eliminates the ability to use the majority vote requirement where numbered positions are used; requires all school boards to have three or four year terms of office; authorizes school boards to adopt the methods by which the change in the term of office shall be implemented; prevents school boards from altering the term of office once three or four year terms have been adopted; eliminates the deadlines for printing ballots and for calling elections, eliminates the election date; and eliminates the provision stating that an at-large representative who moves out of the school district vacates his/her post.

Chapter 12 enables independent school districts to adopt a home-rule charter; provides the procedures and requirements for adopting, amending, placing on probation, revoking, or rescinding a home-rule charter; enables the charter commission, with voter approval, to change the method of electing the school board; requires referendum elections pertaining to the adoption, amendment, or rescission of a charter and provides notice, ballot, and scheduling requirements relating thereto; requires minimum voter turnout percentages for the results of referendum elections to be effective; provides the form of government where annexations or consolidations involving home-rule school districts occur; and requires a home-rule school district to send its charter to the Secretary of State's office to determine whether its adoption involves any voting changes.

Chapter 13 enables school districts to annex and consolidate territory pursuant only to new uniform procedures; eliminates the appeal process where both districts disapprove a petition for detachment and annexation; removes the requirement that the majority of the board sign the annexation and detachment petition for uninhabited land that significantly reduces the tax base; requires a school district involved in any of the actions provided for in this Chapter to have a minimum number of students; changes the petition requirement for creation by detachment from ten percent of the voters in the detached portion of each affected district to ten percent of the total voters in the areas to be detached; extends authority to call a creation election to affected school boards as an alternative to petition; removes the requirement that board members approve creation by detachment petitions; requires a minimum voter turnout percentage for the results of referendum elections to be effective; provides a deadline by which the commissioners court must hold a hearing on a creation by detachment petition; and provides the procedures for the creation of governing boards for newly created school districts.

Chapter 39 authorizes the Commissioner or the Texas Education Agency to indefinitely replace an elected or consolidated school board with an appointed special master, management team, board of managers, etc., that will exercise the school board's powers.

Chapter 45 consolidates bond and tax elections.

The Attorney General does not interpose any objection to Chapter 7, Subchapter D insofar as it lowers the age qualification for Board of Education candidates; Chapter 12 insofar as it provides notice, ballot, and scheduling requirements relating to charter related referendum elections and provides the form of government after annexations involving home-rule

school districts; Chapter 13 insofar as it requires a school district involved in any of the actions provided for in this Chapter to have a minimum number of students; extends authority to call a creation election to affected school boards as an alternative to petition; removes the requirement that board members approve creation by detachment petitions; and provides a deadline by which the commissioner's court must hold a hearing on a creation by detachment petition. However, we note that section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of these changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Nor does the Attorney General interpose any objection to Chapter 11, Subchapter C insofar as it allows the board of trustees of existing independent school districts to increase the number of trustees to seven, enables independent school districts to adopt cumulative voting, and authorizes school boards to adopt the methods by which the change in the term of office shall be implemented; Chapter 12 insofar as it enables independent school districts to adopt a home-rule charter; enables the charter commission, with voter approval, to change the method of electing the school board; and requires referendum elections pertaining to the adoption, amendment, or rescission of a charter; Chapter 13 insofar as it provides the procedures for the creation of governing boards for newly created school districts; and Chapter 45 which consolidates bond and tax elections. Again, we note that section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of these changes. Moreover, these particular provisions are enabling in nature. Therefore, any changes affecting voting that are adopted pursuant to these provisions will be subject to section 5 review (e.g., any rule-making that involves voting changes). In addition, local jurisdictions proposing to implement voting changes pursuant to these provisions (e.g., referendum elections

and changes in method of election) are not relieved of their responsibility to seek section 5 preclearance. See 28 C.F.R. 51.15.

With regard to the remaining provisions, our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under section 5. The following information is necessary so that we may complete our review of your submission.

1. A detailed, chronological description of the process leading to adoption of the proposed changes, including the reasons for these changes, and a detailed description of all discussions, whether formal or informal, involving any member of the state legislature or other state, county, or local school district official or employee, any member of the public or any member of a minority interest group or organization concerning the relative merits or demerits of each of these changes, and any input that may have been received other than through formal meetings and hearings.

2. A description of any alternatives to the proposed changes considered by the legislature, the manner in which each alternative originated, the circumstances in which it was presented to or considered by the legislature, and the reasons why each was rejected or passed over.

3. Copies of the following: (a) all documents relating to the proposed changes, including notes, summaries, minutes, tapes, and transcripts of all discussions, meetings, floor debates and hearings, whether formal or informal, regarding the proposed changes, (b) any correspondence among members of the legislature, other state, county, and local school district

official or employee, any member of the public or any member of a minority interest group or organization regarding the proposed changes; (c) any reports, studies, analyses, summaries, or other documents or publications used by the legislature in devising the proposed changes; and (d) copies of all newspaper articles, editorials, letters to the editor, and advertisements, as well as any other publicity, which address or describe the proposed changes.

4. A description of all formal or informal opportunities afforded members of the minority community, or organizations representing the interests of minority persons, to participate in the development and formulation of the proposed changes. Also, a detailed description of minority input regarding the proposed changes, including the steps taken by the legislature to inform and educate the minority community about the proposed changes and any alternative thereto. We note that you have provided a list of minority legislators and their daytime telephone numbers, but you have not provided the substance of their comments or suggestions, the action taken by the legislature in response, and the reasons for the legislature's action. In addition, please provide this information for any minority persons or organizations commenting on the proposed changes.

5. With regard to the portions of Chapter 7, Subchapter D, which were not precleared above: (a) provide the name, race or ethnic identification and daytime telephone number of each incumbent currently serving on the State Board of Education; (b) provide a detailed explanation of the guidelines and criteria to be used by the State Board of Education in formulating procedures and making rules for placing on probation or revoking home-rule school district charters; an explanation of the reasons the State Board of Education is authorized to make rules that will result in a home-rule charter being placed on probation or revoked; a description

of what, if any, appeal process is provided for a home-rule school district that has been placed on probation or had its charter revoked; and (c) a detailed explanation of the reasons for changing the method of filling vacancies on the Board of Education.

6. With regard to the portions of Chapter 11, Subchapter C, which were not precleared above: (a) in terms of the cumulative voting procedures and the requirement that all school boards adopt three or four year terms of office and a particular staggering schedule, provide a detailed explanation of the reasons school districts with cumulative voting systems will be required to maintain their existing staggering schedule and will be prevented from altering the terms of office, and explain what, if any, consideration was given to the impact staggered terms and specific terms of office may have on the ability of minority voters to elect candidates of choice under a cumulative voting system; (b) provide a detailed explanation of the reasons a candidate for a numbered position will be prevented from declaring the specific position for which, and candidate against whom, he/she is running; (c) clarify whether, or under what circumstances, single-member districts are considered to be "numbered positions" under Texas law, and if so, provide a detailed explanation for requiring school districts with single-member districts to use the plurality vote requirement; and (d) provide a detailed explanation for the elimination of the deadlines for printing ballots and for calling elections, eliminates the election date, and eliminates the provision stating that an at-large representative who moves out of the school district vacates his/her post.

7. With regard to the portions of Chapter 12, which were not precleared above: (a) state whether proposed charters, amendments thereto, and summaries thereof will be provided bilingually; (b) provide the state law and rules referred to in Section 12.027 (a) (3), which if violated, will result in a home-

rule school district charter being placed on probation or revoked; (c) state the grounds or basis upon which a governing body may vote to hold a rescission election; (d) provide a detailed explanation of the reasons for requiring minimum voter turnout percentages to make the results of referendum charter elections effective, any studies or analyses on voter turnout by race/ethnicity in school board elections, and an explanation of what effect this requirement will have on minority voters; (e) indicate the criteria and the benchmark to be used by the Secretary of State's Office in determining whether a voting change has occurred as a result of the adoption of a home-rule school district charter and provide a detailed explanation of the reasons why the Secretary of State's Office will make this determination; and (f) explain the meaning of the word "status" as it is used in Section 12.029 and indicate whether the method of election for the consolidated school district will be provided on the ballot.

8. With regard to the portions of Chapter 13, which were not precleared above: (a) provide a chart which compares and contrasts the voting practices and procedures currently used in making annexations and consolidations and those proposed under the new uniform procedures; (b) provide a detailed explanation of the reasons for the elimination of the appeal process where both of the affected boards disapprove a petition for detachment and annexation; (c) provide a detailed explanation of the reasons for removing the requirement that the majority of the board sign the annexation and detachment petition for uninhabited land that significantly reduces the tax base; (d) provide a detailed explanation of the reasons for changing the petition requirement for creation by detachment from ten percent of the voters in the detached portion of each affected district to ten percent of the total voters in the areas to be detached; (e) provide a detailed explanation of the reasons for requiring minimum voter turnout percentages to make the results of creation by detachment elections effective, any studies

or analyses on voter turnout by race/ethnicity in creation by detachment elections, and an explanation of what effect this requirement will have on minority voters.

9. With regard to Chapter 39: (a) provide a detailed explanation of the powers, duties, responsibilities, and roles that will be played by the Commissioner, the Texas Education Agency, and the State Board of Education in the decision to investigate and/or replace an elected or consolidated school board with an appointed master, team, board, etc.; (b) provide a detailed explanation of the criteria for the selection of a special master, management team members, board of managers, etc.; (c) provide a detailed explanation of the circumstances that will result in the investigation and/or replacement of an elected or consolidated school board and the criteria that will be used by the Commissioner, the Texas Education Agency, and the State Board of Education in making such determinations; (d) provide a detailed description of the powers, duties, and responsibilities for appointed masters, teams, boards, etc., and describe in detail, what, if any, differences there are between the powers, duties, and responsibilities of appointed masters, teams, boards, etc., and those of elected or consolidated school boards; (e) a detailed explanation of the standards or criteria the Commissioner will use in the 90-day review of whether a master, team, board, etc. is still necessary; and (f) a description of the appeal process, if any, for a school district whose board has been replaced by a master, team, board, etc.

The Attorney General has sixty days to consider a completed submission pursuant to section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. See also 28

C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless section 5 preclearance has been obtained. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of this action the State of Texas plans to take to comply with this request.

Finally, although the State notes in its submission letter that the adoption of Chapter 11, Subchapter H which refers to special purpose school districts or Section 12.058 or 12.111 of Chapter 12 which provide for campus or campus program charters and open enrollment charters, respectively, do not involve changes in election procedures, we respectfully disagree insofar as Chapter 11, Subchapter H appears to provide for a change from an elected system to an appointed system and Chapter 12, Section 12.058 and 12.111 appear to be enabling legislation allowing for the creation of elected boards.

It is necessary that these changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without section 5 preclearance. Clark v. Roemer, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 (28 C.F.R. 51.10).

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, please follow the procedures set forth in Subparts B and C of the procedural guidelines.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Mr. Jeffrey Saxe (202-514-6335) of our staff. Refer

to File Nos. 95-1726 and 95-2432 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: */s/*

for Elizabeth Johnson
Acting Chief, Voting Section

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Filed January 16, 1996

JIMMIE CASIAS, SANTIAGO PACHECO, and MARY OCHOA,	)	
Plaintiff(s)	)	
v.	)	CIVIL ACTION NO. SA-95-CA-0221
MICHAEL MOSES, Texas Commissioner of Education, TEXAS EDUCATION AGENCY, TEXAS STATE BOARD OF EDUCATION, and STATE OF TEXAS,	)	consolidated with
Defendant(s).	)	
UNITED STATES OF AMERICA,	)	
Plaintiff(s),	)	
v.	)	CIVIL ACTION NO. SA-95-CA-0275
MICHAEL MOSES, Texas Commissioner of Education, TEXAS EDUCATION AGENCY, TEXAS STATE BOARD OF EDUCATION, and STATE OF TEXAS,	)	
Defendants(s).	)	

ORDER DISMISSING ACTION AS MOOT

Before FORTUNATO P. BENAVIDES, Circuit Judge, and EDWARD C. PRADO and ORLANDO L. GARCIA, District Judges.[1]

This is an action under section 5 of the Voting Rights Act of 1965 ("VRA"), as amended, 42 U.S.C. § 1973c. It is a consolidation of two similar lawsuits challenging the State of Texas's appointment of a management team to oversee and direct the operation of the Board of Trustees of the Somerset Independent School District. The appointment was made under Sections 35.065 and 35.121 of the Texas Education Code. In the first lawsuit, Plaintiffs seek a declaration that the above sections are changes affecting voting requiring preclearance review under the VRA. They request an injunction preventing the State from taking any future action under the sections until preclearance review is obtained. For all practical purposes, the second lawsuit, brought by the United States, seeks the same relief.

On May 11, 1995, the Court entered an order granting preliminary injunctive relief against the State and requiring further briefing on the propriety of a permanent injunction. During the briefing period, the Texas legislature enacted Senate Bill 1, replacing the provisions of Chapter 35 of the former Education Code with new provisions codified at Chapter 39. In addition, the contested provisions of Chapter 35 were repealed. Senate Bill 1 was then submitted to the Attorney General for preclearance review under the VRA.

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[1] In March 1995, the Chief Judge of the Court of Appeals for the Fifth Circuit entered an orders in both cases appointing this three-judge panel in accordance with the provisions of 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

On December 13, 1995, we received notice that Chapter 39 had been precleared as enabling legislation.

We now must consider whether this action is moot in light of the repeal of Chapter 35, the enactment of Chapter 39 and its preclearance under § 5 of the Voting Rights Act. We hold that it is. Consequently, we grant the State's motion to dismiss for mootness, deny the Plaintiffs' motion to amend their complaint and their request for declaratory and permanent injunctory relief, and deny the United States' motion for partial summary judgment.

I. Background.

Our May 11, 1995 order granting preliminary injunctive relief in favor of Plaintiffs describes in detail the events leading to the filing of these lawsuits. We repeat only those facts necessary to our adjudication of the mootness issue.

Sections 35.065 and 35.121 of the Texas Education Code were enacted in 1993 with passage of Senate Bill 7. See Tex. S.B. 7, ch. 347, 73rd Leg., R.S. (1993). These provisions authorize "special accreditation investigations" of school districts, see Tex. Educ. Code § 35.065(a)(Vernon Supp. 1995), and provide for the imposition of sanctions when the district does not satisfy accreditation criteria, see id. § 35.121(a). Among those sanctions is the appointment of "a management team to direct the operations of the district in areas of unacceptable performance." Id. § 35,121(a)(8). By the terms of Senate Bill 7, however, these sections were repealed effective September 1, 1995. See Tex. S.B. No. 7, § 8.33(2).

On May 30, 1995, Senate Bill 1 was signed into law. See Tex. S.B. 1, 74th Leg., R.S. (1995). In this bill, Titles 1 and 2 of the Education Code were reenacted and revised. Id. § 1. Chapter 39 of the bill contains new provisions governing the appointment of management teams. See Tex. Educ. Code

§ 39.131(e). In addition, Senate Bill 1 expressly repealed the former provisions of Chapter 35. See Tex. S.B. 1, § 58(a)(6).

The State contends that the new provisions of Chapter 39 ameliorate the concerns with the former provisions of Chapter 35. Nevertheless, it submitted Senate Bill 1, including the provisions in Chapter 39 dealing with the appointment of a management team, to the Attorney General for preclearance review under the VRA. On August 14, 1995, the Attorney General requested additional information as to these and other sections of Senate Bill 1. On December 11, 1995, she precleared the submitted provisions of Chapter 39 as enabling legislation. See 28 C.F.R. § 51.15 (1995). Therefore, the State is required to seek section 5 preclearance before actually implementing the provisions of Chapter 39 in a school district. See id.

II. Dismissal for Mootness.

Article III of the United States Constitution limits federal court jurisdiction to "cases and controversies." U.S. Const. art. III; see United States Nat' l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173, 2178 (1993). Therefore, "a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Church of Scientology v. United States, 506 U.S. 9, 113 S. Ct. 447, 449 (1992)(quoting Mills v. Green, 159 U.S. 651, 653 (1895)). A case becomes moot if "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)(citations omitted); see also Church of Scientology, 113 S. Ct. at 449 (case must be dismissed as moot if, due to

intervening event, the court is unable to grant "'any effectual relief whatever"').

In a case under the VRA, our role is limited. We must simply determine whether the challenged legislation is within the purview of the VRA and must be submitted for approval under section 5 of the Act. See Allen v. State Bd. of Elections, 393 U.S. 544, 555 n. 19 (1969). While the court is empowered to grant injunctive relief in such an action, it extends only until the proposed legislation is submitted for preclearance review. See. id., 393 U.S. at 555. "Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." Id. at 549-50.

Here, the provisions of Chapter 35 initially challenged by Plaintiffs and the United States have been repealed. Since the State replaced Chapter 35 with new provisions in Chapter 39, which again authorize the appointment of a management team in a troubled school district, the case was not automatically rendered moot. See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 113 S. Ct. 2297, 2301 (1993)(repeal of challenged ordinance and replacement with new ordinance differing in some respects from old did not moot case). Nevertheless, before implementing Chapter 39, the State submitted it and other sections of Senate Bill 1 for preclearance review. Upon its compliance with the preclearance requirements of section 5 of the VRA, Plaintiffs and the United States obtained the relief they sought by filing this action, and the action became moot.[2]

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[2] We are not persuaded by the United States' and Plaintiffs' arguments in opposition to the State's motion to dismiss for mootness. They claim that the State does not view

In addition, now that the Attorney General has completed her determination, no further judicial review by this Court is authorized. See Morris v. Gressette, 432 U.S. 503, 504-05 (1977). Although Plaintiffs may subsequently challenge the legislation in "traditional constitutional litigation . . . it cannot be questioned in a suit seeking judicial review of

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Chapter 39 as containing changes affecting voting and that it might again attempt to implement either Chapter 35 or Chapter 39 before preclearance has been obtained. For these reasons, they maintain that we should retain jurisdiction over this case, or at least hold it in abeyance pending the Attorney General's determination.

The only evidence to support these contentions is language in the State's letter submitting Senate Bill 1 to the Attorney General for preclearance review and a newspaper article concerning recent events at the Somerset Independent School District. As to the language in the submission letter, the State was required to include certain explanatory statements with the submission. See 28 C.F.R. § 51.27(c). It is entitled to argue its case to the Attorney General, just as other interested parties may submit information and comments they believe are material to the Attorney General's determination. See id. § 51.29. Furthermore, we question whether the newspaper article is admissible to show the threat of future action by the State. See New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646, 650 (10th Cir. 1988)(finding newspaper article inadmissible as hearsay). Assuming it is, the article stated only that the TEA was only prepared to "monitor" the school district, an action involving different considerations than the appointment of a management team. See Tex. Educ. Code § 39.131(a)(6).

In any event, the Attorney General has completed her review, eliminating any possibility that Chapter 39 would be implemented before preclearance occurred.

the Attorney General's exercise of discretion under § 5, or [her] failure to object within the statutory period." Id. at 507; see also City of Dallas v. United States, 482 F. Supp. 183, 186 (D.D.C. 1979). For these reasons, we conclude that this case is moot.

III. Conclusion.

Because this action presents no live dispute, we grant the State's motion to dismiss for mootness. It follows that the United States' motion for partial summary judgment, as well as Plaintiffs' request for permanent injunctive relief, both of which concern the now-repealed Chapter 35, must also be denied as moot. Finally, because the contested provisions of Chapter 39 have been precleared as enabling legislation, Plaintiff's amendment of their complaint to include reference to Chapter 39 would be futile. Therefore, that motion is also denied. See Davis v. Louisiana State Univ., 876 F.2d 412, 413 (5th Cir. 1989); Emory v. Texas State Bd. of Medical Examiners, 748 F.2d 1023, 1027 (5th Cir. 1984). Accordingly,

IT IS ORDERED THAT the Defendant's motion to dismiss for mootness, filed June 29, 1995, is GRANTED; and

IT IS FURTHER ORDERED THAT Plaintiffs' motion to amend their complaint, as amended and filed September 18, 1995, and their request for declaratory and permanent injunctory relief are DENIED; and

IT IS FURTHER ORDERED THAT the United States' motion for partial summary judgment, filed July 12, 1995, is DENIED.

SIGNED and ENTERED this ____ day of ~~December,~~ *January* 1995*6*.

/s/

FORTUNATO P. BENAVIDES
JUDGE, UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

/s/

EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

/s/

ORLANDO L. GARCIA
UNITED STATES DISTRICT
JUDGE